

Pages 1 - 50

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN, JUDGE

IN RE TESLA, INC. SECURITIES)
LITIGATION,) No. C 18-4865 EMC
_____)

San Francisco, California
Friday, March 6, 2020

TRANSCRIPT OF PROCEEDINGS

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Official Reporter

1 **Friday - March 6, 2020**

3:25 p.m.

2 **P R O C E E D I N G S**3 **---000---**4 **THE CLERK:** Calling Civil Action 18-4865, In Re Tesla,
5 Inc., Securities Litigation.

6 Counsel, please state your appearances for the record.

7 **MR. PORRITT:** Good afternoon, Your Honor. Nicholas
8 Porritt, of Levi & Korsinsky, on behalf of the plaintiff, Glen
9 Littleton and the class. And with me is Adam McCall of Levi &
10 Korsinsky.11 **THE COURT:** All right. Good afternoon.12 **MR. MCCALL:** Good afternoon, Your Honor.13 **MR. KRISTY:** Good afternoon, Your Honor. Dean Kristy,
14 of Fenwick & West, for the defendants. And with me are my
15 colleagues Jennifer Bretan and Alison Jordan.16 **THE COURT:** All right. Welcome, everyone. Good
17 afternoon. Thank you for your patience.18 I don't really need to spend time on this issue of
19 conversion to summary judgment or request for judicial notice.
20 It seems to me there's nothing that unusual about this case
21 that we can't treat this as a straight motion to dismiss.22 The five documents for which notice is being sought,
23 whether it's proper to take judicial notice of them or not, we
24 can get into a discussion about their relevance and whether
25 they should be noticed for purposes of their existence and not

03:26:13 for the truth of the matter stated, et cetera.

2 As far as I'm concerned, they're not particularly material
3 to what we need to do today, so I'd like to kind of get to the
4 merits of this thing first.

5 And, you know, to get to the August 7th tweet, the whole
6 question, as I assume with respect to truth or falsity and
7 scienter, is the statement "funding secured," not the "am
8 considering." Isn't that the key question here?

9 And it does seem to me that, you know, there's a pretty
10 good argument, at least for purposes of the pending motion,
11 that to say something is secured does not reveal the fact that
12 there are some conditions, one of which was a pretty darn big
13 condition to any funding. And it's arguably not accurate. So
14 I'm not sure that's that complicated.

15 I understand there are other interpretations that might be
16 argued as to what that means, but it seems to me that there is
17 a reasonable interpretation that this means secured.

18 It's a firm offer. As the senior director of investor
19 relations put it, a firm offer is as firm as it gets. So I
20 guess that's the question. Why isn't that enough to survive a
21 motion to dismiss at this point.

22 **MR. KRISTY:** Sure, Your Honor. I'm happy, happy to
23 address that. I do think that's the key issue in the case.

24 I think when you look at that statement, to really
25 understand it and appreciate it, you have to look at the

03:27:59

context in which it was made.

What happened in the days leading up to it? What did he say? What did he say about funding secured afterwards, and how did the market react? Those are all relevant facts that are not just on falsity, but whether this is a deliberate lie. And that's really the test here under *Tellabs*. It's not, could he have used different words, better words, changed the words.

The question is whether he was engaged in a deliberate scheme to hurt investors for ten days, which gained him nothing. That's ultimately the test. That's ultimately what they have to plead and what they have to show.

THE COURT: And one of the arguments is that whether he gained anything himself was not necessarily the motive. This was to get the short sellers, short investors, and he had -- he had it out for them. Whether that's true or not, that will have to be proven. But, I mean, that's -- that's the theory.

MR. KRISTY: Right. They have that speculative motive theory. And I really want to address that today, I really do, because I think that's a very weak theory here, and it's inconsistent with Mr. Musk's actual statements.

But let me step back for just one second, Your Honor, and just talk about this pleading for a second, because this is a very unique pleading in this case.

There are no confidential witnesses cited in this

03:29:14 complaint. There are no internal documents cited in this
1 complaint. There are no attributed sources, other than
2 occasional news articles, in this complaint.

3
4 We have pages and pages and pages of allegations without
5 any reference to where -- what is the basis for this
6 allegation, including this condition that they talk about,
7 about the production facility in the Middle East. Who said
8 that? When? To whom?

9 None of those questions are answered, Your Honor. And
10 that's why the plaintiff knows they've got a little problem.

11 This is a pretty unique complaint that usually doesn't get
12 past the goal line. Those aren't well-pleaded facts, those are
13 just conclusions. They don't cite any basis for it.

14 This is sort of the -- if the musical "Hamilton" were an
15 analogy, you have to be in the room when it happens. Well,
16 they don't have anybody who's in the room when it happens, to
17 support those allegations.

18 That's why they tried to subpoena the SEC, because they
19 know they have these gaps. And that was unsuccessful because
20 the Reform Act doesn't permit that.

21 And that's why the only thing they really do in this
22 complaint is copy wholesale from the underlying allegations in
23 the SEC complaint. Of course, the SEC isn't subject to the
24 Reform Act.

25 And the law is very clear. And I'm going to get into the

03:30:31 merits as though they've actually pleaded something in a
2 well-pleaded way, but the case law in this district is pretty
3 clear.

4 And Judge Freeman dealt with this directly in the *Lending*
5 *Club Securities Litigation*. Just back in November we had a
6 very similar scenario, a lot of wholesale reliance on a
7 government complaint. She said, "Plaintiffs may not allege
8 facts simply because they appear in government complaints."

9 She goes on to say, "They cannot do so without providing
10 any independent corroboration." There has to be some
11 independent basis short of some allegation that some other
12 litigant offered in the case.

13 **THE COURT:** So is the issue whether or not there was,
14 in fact, a condition of opening a plant in the Middle East?

15 **MR. KRISTY:** Absolutely. That's not a well-pleaded
16 factual allegation in this complaint. It's conclusory, but
17 where they get it, on what basis --

18 **THE COURT:** If that were expressly alleged, that
19 contrary to the assertion of -- that funding secured,
20 quote-unquote, that there was, in fact, this obstacle -- major
21 obstacle of having to agree to certain conditions, like opening
22 a factory in Saudi Arabia, that would be enough to state a
23 claim?

24 **MR. KRISTY:** No, I don't agree with that, Your Honor.
25 But what I'm saying is, they haven't even pleaded that. But

03:31:58 let's assume that they did. Let's assume that they did.

2 For purposes of our motion, we assume that these
3 allegations can just be copied wholesale from some other
4 litigant. Let's assume that. I don't think that's proper
5 pleading, but let's assume it's true.

6 So then let's look at the context of what Mr. Musk did do,
7 what he did understand, and what he said. All right.

8 The context. He's had a long-standing interest in taking
9 this company private. That's not disputed. That's been public
10 knowledge for a long time.

11 For two years, the Saudi fund had pursued him about taking
12 Tesla private. They certainly have the wherewithal to take it
13 private. That, too, is conceded in the complaint, paragraph
14 63, among other places.

15 It was the fund that asked for the July 31 meeting with
16 Mr. Musk. And it was attended by their senior decision-maker.
17 And at that meeting -- again, this is undisputed -- that senior
18 decision-maker again urged Mr. Musk to take the company private
19 and informed him for the first time that the fund had recently
20 acquired just under 5 percent, just under the public reporting
21 threshold, of Tesla shares. They bought it, spent billions of
22 dollars to do that on the open market. And, again, he urged
23 Mr. Musk to take the company private.

24 What's the proof of what -- the best proof of what
25 Mr. Musk believed? Because this is a subjective test about

03:33:17 1 scienter. What did he believe? What did he take away from
2 that meeting?

3 Well, it's pretty clear, because two days later, on
4 August 2nd, he emails the board about his proposal to take
5 Tesla private at \$420 a share. This is all before anything is
6 public. This is when everything is private. That's Exhibit A
7 to our motion, it's referenced in the complaint, paragraph 69.

8 And on August 3rd -- and he explains the rationale, the
9 strategic rationale for why he wants to do it, how he would
10 like to structure it.

11 The next day, August 3rd, again conceded in the complaint,
12 there's a meeting of the board, at which Mr. Musk discusses the
13 funding source. He discusses the Saudi fund with the board.

14 Now, if Mr. Musk didn't think that he was going to be able
15 to get funding from the Saudi fund based on that July 31
16 meeting, he wouldn't have emailed the board on August 2, he
17 wouldn't have discussed it with the board on August 3.

18 And the plaintiff has no answer to that at all, even
19 though we've emphasized it five times in our papers, because
20 there is no answer, because it shows you what he really
21 believed, what he believed.

22 Now, what happens after that? Well, an entire process
23 ensues to show that everyone is taking this seriously. The
24 board forms a special committee, retains advisers. Mr. Musk
25 retains lawyers and financial advisers. The company hires its

03:34:43

own set of lawyers --

2 **THE COURT:** Well, paragraph 72 says in response to
3 Mr. Musk's email, the board held that telephone meeting in
4 which he informed the board that PIF was interested in funding
5 a go-private and that the fund was interested in having just to
6 build a production factory in the Middle East. Concerning
7 building a production factory in the Middle East, at least one
8 board member said that's a nonstarter.

9 So there was some discussion about that.

10 **MR. KRISTY:** According to the complaint, that's true.
11 But that's not inconsistent with the fact that they might
12 condition. And that was the way the SEC phrased it, and these
13 guys have copied on it. They might condition, they might not
14 condition. A lot depends on what are you asking the fund to
15 do, how much are you asking them to invest?

16 And that brings me forward, Your Honor, to both the tweet,
17 the circumstances on when he tweeted and what he tweeted. So
18 all of that happens on August 2nd and 3rd, and a process is
19 ensuing.

20 The tweet happens midday on August 7th. The morning of
21 the tweet, the *Financial Times* reports an article that says the
22 Saudi fund had acquired 5 percent of Tesla shares, and the
23 price spikes up.

24 And proof that the price spiked up is in the SEC complaint
25 itself. It's in paragraph 4, paragraph 46, paragraph 75, where

03:36:01 they all talk about how the price was up that day, about
2 5 percent, before Mr. Musk ever tweeted.

3 So he sees that --

4 **THE COURT:** What paragraph was that?

5 **MR. KRISTY:** It's in paragraphs of the underlying SEC
6 complaint. These guys have decided not to copy those
7 paragraphs, but it's in paragraph 4, paragraph 46, and
8 paragraph 75, where the SEC talks about the price movement that
9 day, before Mr. Musk --

10 **THE COURT:** But it's not in this complaint.

11 **MR. KRISTY:** It's not in this complaint. What's in
12 this complaint, in paragraph 90, is an analyst's report that
13 says -- and it's quoted in the complaint, that says, The price
14 spiked up this morning upon a report that -- by the *Financial*
15 *Times* that the Saudi fund acquired somewhere between 3 and
16 5 percent of the shares. That's in paragraph 90.

17 And none of that is really seriously contested. I mean,
18 the fact of the *Financial Times* story and that it occurred 30
19 minutes before he starts tweeting is sort of an unassailable
20 fact. They want to fight about what inferences you draw from
21 all that, and that's fair enough. We can discuss that.

22 But that's the state of play. And when Mr. Musk issues
23 his tweet, he says, I really wanted to do this so that all
24 investors would have the same information at the same time.
25 That's what happens.

03:37:25 Now, let's look at those words that he used and the
2 context he used them, what happens. So, literally, what that
3 tweet says is, "Am considering taking Tesla private at 420.
4 Funding is secured."

5 The next time Mr. Musk speaks to that issue is on
6 August 13. And there's the blog post. It's Exhibit K. It's
7 also quoted verbatim in the complaint, where he explains "why I
8 said funding secured."

9 So between August 7th, the tweet, and August 13th, when he
10 gives his explanation, there is a lot of noise in the market.
11 No doubt about it. And analysts -- again, the ones quoted,
12 paragraph 97 of the complaint, analysts are saying, That's an
13 incomplete statement. He hasn't provided any details. It
14 could mean any one of a number of things.

15 And Evercore, one of the analyst's reports quoted in the
16 complaint, talks about that. Could be a written commitment.
17 Could mean a verbal commitment. Could mean less than that.
18 It's unclear what it means.

19 But under *Brody* and other Ninth Circuit authority, the
20 fact that a statement is incomplete doesn't make it misleading.
21 You've got to show more than that. You've got to show that it
22 affirmatively creates an impression of a state of affairs that
23 differs in a material way from the one that actually exists.
24 That's the legal test. Not incompleteness. Not I'd like to
25 know more. The facts have to be much different.

03:38:48 So Mr. Musk --

2 **THE COURT:** Well, it depends on the materiality of the
3 facts that are omitted.

4 **MR. KRISTY:** Absolutely. Absolutely, Your Honor.

5 **THE COURT:** And if there was a contingency that was
6 potentially problematic or substantial, substantial commitment,
7 that could be deemed sufficiently material to make that a
8 misleading statement.

9 **MR. KRISTY:** Potentially, Your Honor, but, you know,
10 we don't even have to speculate about it because on August 13th
11 Mr. Musk explains exactly what he meant.

12 On August 13th, in that blog post, he gives the background
13 to his historical meetings with the fund. He gives the details
14 of what he thought his discussions were about. And he explains
15 why he came away from that meeting with, in his mind, no
16 question that a deal with the Saudi fund could be closed. And
17 he explains that in detail.

18 And how does the market react? This is theoretically new
19 information, more information. There's no indication from
20 Mr. Musk in that tweet that "I have a terms sheet," that "we
21 agreed on all of the terms of any potential financing," all the
22 stuff that the plaintiff alleges.

23 So he says all of that on August 13th, and how does the
24 market react? The market doesn't react at all. In fact, the
25 price doesn't go down. That's what you would expect if this

03:40:01 was some revelation that was highly inconsistent with his
2 original tweet. Instead, the price actually goes up a little.

3 And one of the analysts, I think -- that's quoted in the
4 complaint, paragraph 105, I think, hits it spot on, spot on.

5 It's a *Morning Star* report, august 14th --

6 **THE COURT:** You're getting to causation now. I
7 thought we were just talking about the very threshold issue of
8 truth and falsity, so I don't need to hear about -- what's the
9 relevance of whether the market actually went up or down at
10 this point?

11 **MR. KRISTY:** Well, it goes to show you, Your Honor,
12 that -- whether the market was misled in the way that the
13 plaintiffs are claiming.

14 **THE COURT:** That's indirect evidence of whether there
15 was truth or not. And my question is, in his August 13th
16 tweet, where does he say anything about the potential plant in
17 Saudi Arabia?

18 **MR. KRISTY:** He doesn't say that, because, again,
19 that's not a well-pleaded allegation in the complaint.

20 **THE COURT:** Isn't that the point? Instead, he says no
21 question that a deal with the Saudi sovereign fund could be
22 closed. That's an impression he left.

23 **MR. KRISTY:** Right. That's his conclusion, correct.
24 He said, "I believed." I left that meeting --

25 **THE COURT:** Yeah. He said that, but he doesn't say

03:41:21 anything about, well, there's one potential fly in the
2 ointment, that at least one board member says it's a
3 nonstarter, and that is, we've got to open a plant in Saudi
4 Arabia.

5 **MR. KRISTY:** And we don't know from the complaint when
6 that director supposedly said that, who that director even is,
7 to whom they said it. That's not pleaded. That's kind of a
8 who, what, when, why, and where on fraud.

9 **THE COURT:** Well, it is said that it happened, that
10 comment was made at the meeting of the 3rd; right?

11 **MR. KRISTY:** Well, they have that in that paragraph,
12 but what's the basis for that allegation? Just lawyer say-so?
13 There isn't a cited source. There isn't a reference to
14 anything. With the aid of a wordprocessor, anyone can type
15 anything.

16 But let me go to the mindset, Your Honor, because even if
17 you want to think that Mr. Musk's words could have been better,
18 he could have used different words, let's go to what's his
19 motive. What's his incentive? Why would he lie about that
20 detail? What did he stand to gain from that?

21 And the plaintiff doesn't really answer that. We get kind
22 of two arguments that are really the main scienter arguments in
23 their brief. One is that he admitted it. Right? They say
24 they interpret the SEC settlement as some sort of admission,
25 when, in fact, it's a no admit/no deny settlement, which

03:42:41 reserves his right to contest anything in any case.

2 So that is sort of a roadmap to nowhere, but that's one of
3 their two main arguments. He admitted that he never had
4 funding. So that doesn't work.

5 So then the other motive, why would he lie? Because you
6 still have to have some rationale. That is the short seller
7 reasons -- right? -- that he wanted to do it to get at the
8 short sellers.

9 Well, that argument -- put aside, sort of, the speculative
10 nature of that, nobody comes out and says it -- it really kind
11 of backfires in some ways here. No one really triggers an
12 entire process, hiring advisers and special committees and the
13 like, just to hurt short sellers. It's not all some big, grand
14 ruse to get at short sellers for a short period of time.

15 Obviously, short sellers are hurt every time a stock price
16 goes up, they benefit every time a stock price goes down. That
17 in and of itself doesn't prove anything. That happens every
18 single day.

19 When you look at what Mr. Musk -- and he does refer to
20 short sellers in Exhibit A when he goes to the board on
21 August 2 and says, here's among the rationale for why I want to
22 take the company private, and he repeats it.

23 In his August 7th blog, he makes reference to short
24 sellers. But what he says about short sellers is that the
25 benefits of the transaction are, in part, designed to get away

03:44:02 from their negative propaganda and their defamatory remarks
2 that hurt our valuable brand and hurt our shareholders.
3 Shareholders who, he also tweeted, I might add, on August 7th,
4 who he said he will ensure their protection and their welfare.
5 Those are among the tweets.

6 So what is he saying? He's saying we have to get away
7 from this short-term thinking, the defamatory remarks and
8 negative propaganda of the short sellers.

9 That isn't a reason, a motive, to commit fraud. It's a
10 motive to take the company private. It underscores his good
11 faith, not his bad faith.

12 He didn't say, I did this so I could get even with the
13 short sellers. He said, We've got to get away from them. That
14 enhances the value of our company, it enhances the benefit to
15 the shareholders.

16 And it's obvious, if he was just lying about that. So
17 let's say it's just a grand ruse. Right? It's just to lie
18 about it. I'm just going to say it, "funding's secured."
19 That'll really give it to the short sellers.

20 Let's say that there was a fact witness who even could
21 support that. Well, the lie is going to be revealed ten days
22 later when they don't do the deal. That's not something you
23 can conceal.

24 **THE COURT:** I guess that's the question. If the
25 untruth is proven, and I know you contest that vigorously and

03:45:19 you say they haven't alleged it sufficiently, but if it's
2 unproven, I'm not sure, in a case like this, you need much more
3 in terms of scienter.

4 I mean, motive sometimes provides one of the plus factors
5 when you're looking at projections and you can't tell whether
6 it's a sincere projection or not. But here, if it is found
7 that this was a material omission and misleading statement and
8 he knew what the real facts were, i.e., you know, there was a
9 real problem, that funding wasn't secure absent some condition
10 that at least one board member said was a nonstarter, I don't
11 know how deep you have to get into this.

12 It's not your typical case where you have to get deep into
13 motive and -- you know, it's an ancillary factor.

14 **MR. KRISTY:** Fair enough, Your Honor. Fair enough.
15 But that's their argument. Their argument is admissions and
16 short sellers. And I don't think that those work. I don't
17 think a fraud for ten days designed to hurt short sellers, only
18 to reveal the truth, makes a whole lot of sense.

19 **THE COURT:** Well, let me ask you, where is it that --
20 what is the untruth? Is it the "funding secured"?

21 **MR. PORRITT:** In that particular tweet, "funding
22 secured," Your Honor.

23 **THE COURT:** What is untruthful about that?

24 **MR. PORRITT:** Funding wasn't secured.

25 **THE COURT:** Well, why was it not secured? Was it

03:46:3d because of the condition, or was it because there was still the
2 shareholder approval thing, or was it because there was some
3 uncertainty on the Saudi side? What was it that made it not
4 secured?

5 **MR. PORRITT:** There was no agreement, verbal or
6 written, to provide funding. There was no agreement on the
7 terms of the funding. There was no suggestion, no agreement on
8 the price on which the transaction would occur.

9 There was no consideration of the amount for which the
10 funding will be provided by that particular fund or by any
11 other fund. There was -- no firm decision had been made by the
12 public investment fund to commit to any funding.

13 And there was the condition of the manufacturing facility
14 in the Middle East, which is one of the conditions but only one
15 of the many.

16 **THE COURT:** And where is that alleged?

17 **MR. PORRITT:** Well, that's set forth in paragraph 64
18 and 65 of the complaint, paragraph 72 of the complaint,
19 paragraph 102 of the complaint. And *New York Times* noted,
20 paragraph -- in 112, funding was not secure and that the PIF
21 had not committed to provide any cash.

22 And so I think it's more than well-pleaded, on a motion to
23 dismiss, that funding was not secured at this particular
24 instance on August 7th.

25 I mean, "funding secured" -- my friend said that, you

03:47:54 know, this isn't a question about the choice of words. Well,
2 of course it's about the choice of words, because "funding
3 secured" isn't "funding might be secured," "confident in talks
4 about funding." Lots of different ways Mr. Musk could have
5 expressed the same idea. He didn't. He used "funding
6 secured."

7 **THE COURT:** So why doesn't that go to scienter? If
8 it's a matter of, yeah, well, maybe they didn't come down with
9 a term sheet or anything, but why can't it be inferred that he
10 had enough confidence in this, in his conversations, to believe
11 that it was, in a more kind of lay sense, secured? And, in
12 fact, enough that he sent an email to the board to talk about
13 this?

14 Well, I guess he did admit, at least, according to
15 allegation in 69, that there's a lot of uncertainty, but,
16 nonetheless, that -- you know, that he had enough interaction
17 with the officials in the PIF to believe that they were ready
18 to commit.

19 **MR. PORRITT:** Well, first of all, his email to the
20 board doesn't say "funding secured." So to say the tweet is
21 consistent with the email to the board is incorrect because
22 "funding secured" is additional to it, and it's in that
23 August 2nd email to the board.

24 And I would submit that "funding secured" is -- it's very
25 notable it's in the past tense, as if it's been completed.

03:49:31 Funding is available, is completed, is secured. And that was
2 the phrase that the entire market, as you picked up on, and all
3 the analysts picked up on.

4 And I don't think you can get a better proxy for what the
5 market -- for a reasonable investor than JP Morgan. And their
6 analyst was very clear, saying either funding is secured or it
7 is not secured, and Tesla's CEO says funding is secured.

8 That's in paragraph -- that's an analyst's quote in paragraph
9 96 of the complaint.

10 I mean, it can't get any more crystal clear than that.
11 And funding wasn't secured under any rational interpretation
12 the -- of those words and, certainly, under any reasonable
13 inference that we are entitled to as a plaintiff on the motion
14 to dismiss.

15 I think we have more than adequately pleaded that that
16 statement's incorrect. And as Your Honor, I think, has
17 identified, if you accept that it was untrue, then it was
18 knowingly or at least deliberately recklessly untrue by
19 Mr. Musk, because he was the one who knows whether funding was
20 secured or not.

21 And to get to Mr. -- counsel's arguments about the
22 context, you initially didn't want to talk about the motion to
23 convert, but all those facts that he talked about, about the
24 *Financial Times* article, and what Mr. Musk was doing, and how
25 he was responding to the market price, none of that is in the

03:50:49 complaint. That is all additional facts.

2 No one knows -- there's no fact, we don't know Mr. Musk
3 ever read that *Financial Times* article or that he knew what the
4 stock price was doing. The *Financial Times* article was
5 published at 12:18 p.m. He tweeted at 12:48 p.m. During that
6 time he has stated he was driving to the airport from his
7 house, driving himself while tweeting, incidentally.

8 So when he saw this article, how it was brought to his
9 attention, if it ever was, the fact that on August 13th, as
10 counsel said, he set forth a self-serving statement for the
11 circumstances to try and limit the damage caused by this
12 August 7th tweet, nowhere does he mention responding to a
13 *Financial Times* article.

14 Nowhere does he respond to a price spike that had
15 occurred, supposedly, around noon on -- noon Eastern Time on
16 August 7th, which, by the way, is not in the complaint and is
17 not even referenced that -- that analyst article that counsel
18 referred to did not refer to a spike in price; it refers to
19 just the *Financial Times* report.

20 **THE COURT:** Explain to me, what -- maybe I don't fully
21 understand. What is the alleged response to the financial --
22 why is the August 3rd tweet -- or is it August 7th --
23 August 7th tweet a response -- I guess I'm missing something.

24 How is that a response to the *Financial Times* article
25 about the Saudi investment?

03:52:25 **MR. PORRITT:** It's not our theory, Your Honor.

2 **THE COURT:** What do you understand it to be?

3 **MR. PORRITT:** I think what they're trying, because
4 they realize that the previous excuses by Mr. Musk don't hold
5 water, so this is like -- this is like version number five of
6 why he said "funding secured" when he had no basis to do so.

7 So it was set forth for the very first time in the motion
8 to dismiss filed a few months ago, 18 months after this tweet.
9 For the very first time, after he's had *New York Times*
10 interviews and put his own blog post out there, he comes up
11 that he was really responding to concern about there was an
12 increase in price following, supposedly, this *Financial Times*
13 article published at 12:18 p.m. on August 7th.

14 And then, I don't know why, to ameliorate or to some way
15 explain what that might be all about or that that news about
16 his discussions with the public investment fund might leak out
17 somehow, he decided to send out this tweet. I think that is
18 the theory. It is rather half baked.

19 **THE COURT:** Once again, explain what is the --

20 **MR. KRISTY:** That's the inference, Your Honor. In
21 other words, he did make this tweet midday while the market was
22 open. So you kind of ask yourself, well, why did he do it
23 then; right? Plaintiffs don't have an allegation as to why he
24 did it then.

25 They have motives, theory, as to why he was lying and

03:53:48 everything else, but why did he issue the tweet at the time he
1 did? Well, he had just had the meeting with the Saudi fund.
2 Their investment was not public information because they were
3 under the 5 percent public reporting threshold, and yet a news
4 story leaks containing that information.

5 So a natural inference from that is what else is going to
6 leak is the nature of the discussions about the take-private
7 transaction that everyone agrees they also discussed on
8 July 31st. So that, the tweets follow that. It's simply an
9 inference.

10 You don't have to depend -- it wouldn't explain a lie.
11 It's not a defense to a lie, but it's an explanation for what
12 is the sequence of events, what are the exigent circumstances
13 that are causing him to tweet. That's no more than that.

14 **THE COURT:** The idea this would preempt further leaks?

15 **MR. KRISTY:** Correct. Correct. That makes sense;
16 right? And now he's telling everybody at the same time what
17 the -- about the transaction that he's considering.

18 You don't have to put undue weight on it, but they react
19 to this story as though it's some bad fact for them. And it
20 simply explains the sequence of events that occurred between
21 the time of the meeting with the Saudi fund and the time of the
22 very first tweet.

23 I want to add one other thing --

24 **THE COURT:** I'm still trying to understand how --

03:55:09 substantively, why does this -- I mean, if you're afraid it's
1 going to be leaked out that there's discussion, why not say it?
2 This may be problematic, but why not say something a little bit
3 more accurate, like "preliminary discussions about possibly
4 going private" or something?

5 To name a price and say "funding secured" seems to go a
6 couple of steps beyond just merely anticipating and preempting
7 a further leak.

8 **MR. KRISTY:** Well, "am considering" is accurate. He
9 was considering it. And no final decision was made. He says
10 that.

11 **THE COURT:** What about the 420?

12 **MR. KRISTY:** 420 was the price. That's in the email
13 to the board. That's why he's considering taking the company
14 private. There's no allegation in this case, a fact allegation
15 said that that wasn't really the price.

16 So you go back to "funding secured." And what would be
17 really easy in this case to show falsity of that statement is
18 if you couldn't do this deal because of an absence of funding.

19 All right. If you had to come clean later on and said, "I
20 couldn't get the money," then, yeah, that goes to your scienter
21 point, Your Honor. That would be, sort of, a direct evidence
22 of a lie, but it's not all the shades of gray of saying, look,
23 I believe I could get this funding.

24 It's so -- I'm trying to think of a good analogy, Your
25

03:56:19 Honor, and I don't have a perfect one, but let me take a stab
2 at this one. All right.

3 Suppose Your Honor is interested in buying a house, and
4 for two years you've been in discussions with a bank about
5 providing you with financing for that house. And the bank is
6 telling you, Judge Chen, buy that house, we're going to give
7 you the money. Buy the house, we're behind you all the way.

8 And then they meet with you again a couple of days before
9 you make an offer on the house, and they say, Judge Chen, let's
10 do this, we're going to support you, we're going to give you
11 that funding.

12 Now, you haven't signed the mortgage, you don't know all
13 the deal terms, you haven't agreed to all of the dotting of the
14 Is and the crossing of the Ts, but that's what they're telling
15 you.

16 And then you go and you meet with your buyer, and they
17 say, Are you going to be able to pay for this? And you say,
18 Yeah, funding's secured. That's not a lie.

19 It's incomplete. It doesn't say anything about what the
20 nature of that secured funding is, but it's an accurate
21 statement about what you're trying to convey. And it's
22 certainly not a purposeful fraud, especially when, as it turns
23 out, you have the funding to do the deal.

24 And that kind of circles around, Your Honor, to one other
25 issue that's in this case. And, again, I know --

03:57:31 **THE COURT:** Well, the comeback is going to be, unlike
1 the situation you posit where there's been a specific
2 discussion with the bank about the terms and how much and that
3 sort of thing, they say in paragraph 64 that there are no
4 fundamental terms discussed, like the dollar amount, the
5 ownership percentage, acquisition premium, if any, potential
6 restrictions, et cetera, et cetera, that these are -- that's
7 like me telling the seller funds secured, and I just had a
8 preliminary discussion with the bank that says, yeah, we're
9 interested in lending on something, but you'll have to get me
10 some more information at some point. And I don't have an
11 appraisal, I don't have an amount, I don't have anything.

13 At some point, I mean, I understand that maybe, number
14 one, it's not necessarily untruthful, it's not necessarily
15 misleading, or it's a harder case for scienter, but it sort of
16 depends on, you know, on how far along the spectrum one is when
17 one says "funding secured."

18 **MR. KRISTY:** Understood, Your Honor. Let me bring one
19 other issue up with "funding secured," if I may.

20 **THE COURT:** Yeah.

21 **MR. KRISTY:** And that's the loss causation point. And
22 I know loss causation isn't usually the -- you know, it's more
23 the tail than the dog. But one thing that's pretty compelling
24 in this situation is whatever you think "funding secured"
25 means, Mr. Musk only spoke to it on August 7th, okay.

03:58:50 The price goes up on August 7th. He speaks to it on
1 August 13th, price doesn't move. Talking about what he meant
2 by "funding secured." That's it.

3 There are no other class period statements about funding
4 secured until August 24th, after the class period, when he
5 reaffirms that the process said to him that funding would not
6 have been an obstacle, that it actually confirmed that funding
7 was available.

8 So to have loss causation, you have to show that there's a
9 corrective disclosure that "funding secured" was revealed
10 during the class period to be a lie, that there's a corrective
11 disclosure. And that can't be. It can't be speculation from
12 market participants about that or analysts writing their own
13 opinions about it.

14 The law is very clear about that. If you read
15 Judge Orrick's decision in the *Cellular Biomedicine* case, Judge
16 Seeborg's case in *Trexon*, what pundits think about doesn't
17 matter. What's the corrective disclosure? There is none.

18 The plaintiff takes a stab at one. They say that
19 *The New York Times* article dated August 16th, that gets
20 published on August 17th, contains an admission from Mr. Musk
21 that funding was not secure. That's what they say.

22 They talk about that article a whole bunch, by the way.
23 But they never gave you the article, so we gave it to you.
24 It's Reply Exhibit 1 to the Bretan declaration.

04:00:25 We gave you that article. And that article can be read in
2 vain for any admission from Mr. Musk that he didn't have
3 funding.

4 In fact, what that article does, to the extent it talks
5 about the take-private transaction is it basically reiterates
6 everything Mr. Musk said on August 13th. And the author
7 concludes -- based on the same information that's already out
8 there, the author says something like, but funding was far from
9 secured.

10 So that's great for *The New York Times* author, but that's
11 not a corrective disclosure coming from the company. It's a
12 rehash of information that's already out there.

13 Now, the stock price does decline a little bit that day,
14 on August 17th, but it has nothing to do with new information
15 about funding secured or even new information about the
16 take-private.

17 There's a bunch of derogatory comments in that article
18 about Mr. Musk in terms of how emotionally drained he is.
19 There are allegations of recreational drug use and other things
20 in there in that story, and we put it before the Court. It's a
21 very negative, unfair story.

22 But in terms of a corrective disclosure on funding
23 secured, it just ain't there. And this is a fundamental
24 element of their claim --

25 **THE COURT:** Well, at least as represented in the

04:01:41 complaint, it states that the going-private transaction was far
2 from secure and that the PIF had not committed to provide any
3 cash.

4 **MR. KRISTY:** That's the allegation. That is a quote.
5 What they're trying to do is quote the article. But that's not
6 a corrective disclosure by the company. And it's all based on
7 information that's already out there on August 13th.

8 What they're saying in their papers is Musk admitted it,
9 and he did not. He's never admitted it.

10 **THE COURT:** Where, on August 13th, was it evident to
11 the public that the PIF had not committed any --

12 **MR. KRISTY:** Well, because he describes exactly what
13 they did do. And he said that it was -- he describes their
14 conversation, describes what the level of --

15 **THE COURT:** You're talking about his August 13th
16 tweet?

17 **MR. KRISTY:** His August 13th blog post.

18 **THE COURT:** The blog post.

19 **MR. KRISTY:** Right. It's Exhibit K, I believe.

20 **THE COURT:** It's quoted in 103.

21 **MR. KRISTY:** Yeah, it's quoted in 103. Let me just go
22 to it, Your Honor.

23 And he says -- and he goes through there. And when you
24 look at the tweet in Exhibit K, he says, "Why did I say
25 'funding secured'?" and he gives the history of what happened.

04:02:54 He talks about the recent meeting with the Saudi fund. He
2 said:

3 "During the meeting the managing director of the fund
4 expressed regret that I have not moved forward previously
5 on a going-private transaction with them, and he strongly
6 expressed his support for funding a go-private
7 transaction. I understood from him that no other
8 decision-makers were needed and that they were eager to
9 proceed."

10 He then says:

11 "I left the July 31 meeting with no question that a
12 deal with the sovereign fund could be closed and that it
13 was just a matter of getting the process moving. That's
14 why I referred to 'funding secured' in the
15 August 7th announcement."

16 And he goes on to say in the next paragraph that -- what
17 his conversations had been with the Saudi fund, and he says he
18 has expressed support for proceeding subject to financial and
19 other due diligence and their internal review process for
20 obtaining approvals.

21 And he goes on to say he also asked for additional details
22 on how the company would be taken private, including any
23 required percentages and any regulatory requirements. That's
24 what he says.

25 Now, at that point in time does he literally say "Here's a

04:04:01 bunch of things that I didn't have"? Well, he didn't. But
1 nobody reading that paragraph could say, There's a term sheet,
2 we have a certain amount guaranteed coming from the Saudi fund.
3 There's just no way you can read those words and interpret them
4 in that way.

5 So this is the exact description of what he's saying
6 happened, and it's the way the market reacts to it. That
7 *Morning Star* report says, yeah, it just looks like the Saudi
8 fund can provide some sizable financing, and this isn't going
9 to be an impediment to getting the deal. That's what he
10 literally says. He explains it.

11 So whatever you think of his words on August 7th, and
12 maybe he was too optimistic and he got out a little over his
13 skis, but he tells you exactly what he meant on August 13th.
14 And that's not indicative of scienter, some intent to mislead.
15 He's telling you, in effect, I don't have this term sheet and
16 all the other details agreed upon. This is what I'm doing.

17 And if you move on in that same document, again, the parts
18 that aren't even alleged to be misleading, he says -- it's
19 couple of paragraphs down. He says:

20 "I continue to have discussions with the Saudi fund,
21 and I am also having discussions with a number of other
22 investors, which is something that I always planned to do,
23 since I would like Tesla to continue to have a broad
24 investor base."

04:05:21 That's what he says. That, too, is consistent with his
2 tweets. Because one of the tweets that the plaintiff doesn't
3 like, they don't like to talk about much, but one of his early
4 tweets, in response to a question from stockholders, is in
5 Exhibit D. And one of the things they asked him and one of the
6 things he said is, "I don't have a controlling vote now. It
7 wouldn't expect any shareholder to have one if we go private."

8 So he's saying from the very beginning, well, I think I
9 can get the money for this. Nobody is going to -- nobody is
10 buying 80 percent of this company. This is going to be a
11 widely dispersed group. And he says that in the tweet. That's
12 what that conveys, Exhibit D, and it's entirely consistent with
13 his statement on August 13th.

14 And that's why you can't find fraud. You can quarrel with
15 his words. I get it. I get it. But the notion that he's
16 trying to mislead people, trick them into thinking that the
17 Saudi fund had signed some commitment letter, that's just not
18 consistent with the facts and the inferences that you can draw
19 from them.

20 And that's why there's no loss causation, too, because the
21 market -- how does the market react to August 13th? It kind of
22 understands this already, because the market is like, uhm,
23 okay, there isn't a big crash like this is new information.

24 **THE COURT:** I tell you, the way I read this --

25 **MR. KRISTY:** Okay.

THE COURT: -- I mean, it looks like he's justifying what he said after the 31st meeting, which seemed much more certain, because he says it was expressed to him strong support for the funding, that no other decision-makers were going to be needed, they were eager to proceed; therefore, he left the July 31st meeting with no question that a deal with the Saudi sovereign fund could be closed, just a matter of getting the process moving.

That's why, retrospectively, I referred to "funding secured" in the August 7th announcement. Following that announcement, he muddied it a little bit and says, well, I continued to communicate with the managing director. He expressed support for proceeding. Based on due diligence and internal review, he asked for additional details.

He's now saying -- after the August 7th announcement, he's got a slightly different gloss on things. Well, they've got to do due diligence and, by the way, uhm, you know, I want to see what other sources there are. It may be premature, you know, to commit to one. I continue to have discussions.

So it sounds to me like a little bit of backtracking, which doesn't necessarily mean that his -- I mean, he's explaining his scienter, because he says, according to him, he firmly believed as of 31st he had the deal in the bag, there was nothing other than just moving forward.

After the 7th, he's now saying on the 13th, well, it's a

04:08:15 little premature, we've got to do some due diligence, blah,
2 blah, blah, blah, blah. And by the time the article comes out
3 on the 16th or the 17th, at least it's stated that, well, the
4 fund had not committed to providing any cash and was far from
5 secure.

6 So there is a shift over time. And there's going to be
7 issues in this case about loss causation because, you know, I
8 forget what happens on the 13th when there's a slightly
9 different tone and an even different tone on the 16th or 17th,
10 but that's the way it looks to me when I look at this
11 complaint.

12 **MR. KRISTY:** Understood that, Your Honor. But on loss
13 causation, the law is pretty clear that it's not loss causation
14 based on the opinion of a *New York Times* article written -- if
15 you wanted to say that the company made a corrective disclosure
16 on August 17th, then that loss might be loss causation.

17 **THE COURT:** You're saying it's the law that if a
18 falsity is discovered and not admitted to by the company, they
19 don't make a formal corrective disclosure, but it is discovered
20 and uncovered, let's say, by an agency or an investigative
21 reporter and stock drops, there is no loss causation?

22 **MR. KRISTY:** There can be, but if the reporter is
23 revealing new information. If they are basing their
24 conclusion --

25 **THE COURT:** Well, that's the argument here, is the

04:09:31 August 16th article knew when it says it was far from secure,
2 which is a lot different from saying it was secured, and the
3 that the fund had not committed to providing any cash.

4 That's a little different -- well, quite a bit different
5 from the original tweet, and quite a bit different from the
6 August 13th blog.

7 **MR. KRISTY:** But when you read the article -- this is
8 the key, it's not that conclusion. It's is this opinion
9 based -- this is what Judge Orrick talks about in *Cellular
10 Biomedicine* and what Judge Seeborg talks about in *Trexon*.

11 It's, is that opinion of the market analyst/reporter,
12 whoever it is, is this based on new information or is it simply
13 their opinion based on old information?

14 And the problem the plaintiff has is they have the
15 pleading burden here. I don't have to disprove it. They have
16 to plead what the new information was that lends support for
17 that conclusion.

18 And they haven't done that because, to the extent that
19 article talks about the take-private transaction, it's the same
20 stuff that was already in the market by August 13th. That's my
21 simple point, Your Honor.

22 You're right, yes, an investigative report, sure, if it's
23 based on new information. But the plaintiff -- and this is a
24 specificity requirement under Ninth Circuit in the *Apollo Group*
25 case. The plaintiff has to plead loss causation with

04:11:01

specificity.

2 So show what's new in that article about the take-private,
3 not just the ultimate opinion of the author. What are the new
4 facts about the take-private? And that's what they haven't
5 pleaded, and that's why they can't show loss causation, in my
6 mind, as to "funding secured."

7 **THE COURT:** All right. Let me get your response. And
8 I'd like to know, why is there kind of at least a partial
9 withdrawal or partial disclosure by the 13th?

10 **MR. PORRITT:** Well, Your Honor, so August 13th,
11 first -- and I think Your Honor has it exactly right -- it's
12 useful as an attempt for damage control by Mr. Musk. I think
13 it is self-serving, and I think it is -- he condemns himself
14 out of his own mouth, because of the things that Your Honor
15 described, that there will be due diligence; that there'll be
16 further discussions; that we'll do a market test about other
17 potential inventors.

18 All of that is what happens before funding is secured, not
19 after funding is secured. So all those statements demonstrate
20 the falsity of the August 7th tweet that funding was secured.

21 **THE COURT:** And what happened to stock prices upon the
22 release of the 13th --

23 **MR. PORRITT:** The stock price is kind of flat starting
24 out. But what I would add to that --

25 **THE COURT:** Does that have any causation problem for

04:12:18

you?

2 **MR. PORRITT:** With respect, no, Your Honor, because --
3 and let me say why. Because counsel for Mr. Musk and Tesla
4 here, of course, have omitted half of our loss causation
5 allegations, which was there was extensive reporting in the
6 media every day from August 7th right through to August 17th.

7 A critical disclosure was the disclosure on August 9th,
8 that an SEC investigation was -- had been opened investigating
9 whether Mr. Musk had any factual basis for his "funding
10 secured" and other tweets on August 7th, which, under *Lloyd*, by
11 the Ninth Circuit, is more than enough to establish loss
12 causation. And the stock price went down \$18 on the day after
13 that news report.

14 There was a further report on August 16th that -- that
15 formal subpoenas had been issued by the SEC, again aimed
16 directly at whether Musk intentionally misled investors through
17 his August 7th tweets.

18 So all of that is information that goes into the market,
19 as well as other reporting by *Bloomberg*, by the *Wall Street*
20 *Journal*, by *The New York Times*, all of which --

21 **THE COURT:** And that's within the chain of causation,
22 that the SEC disclosure, obviously, as you would argue, is
23 causally related to the untruth.

24 **MR. PORRITT:** Absolutely. There is cases, obviously,
25 of just a general disclosure an SEC investigation exists may

04:13:41 not be sufficient to establish loss causation.

2 But I'd say the *Lloyd* case is crystal clear on this, by
3 the Ninth Circuit, that where that investigation is tied to the
4 subject matter or the alleged misrepresentation, and the stock
5 price declines, and there's a subsequent disclosure by the
6 company, or it is subsequently revealed that, in fact, the
7 subject matter of the fraud is sort of confirmed, if you like,
8 by the subsequent disclosure, the drop on the announcement of
9 the investigation establishes loss causation.

10 So here you don't need to try and connect the dots to
11 whether the SEC investigation announced related to the Musk
12 tweets on August 7th, Musk and Tesla tweets on August 7th,
13 because that's what the story said.

14 **THE COURT:** So what was new about *The New York Times*
15 piece that brought to the market new information that resulted
16 in further loss?

17 **MR. PORRITT:** So I think there's a -- I think a bunch
18 of things. And we've been focusing very much on "funding
19 secure," and I think that's correct, but that's not the only
20 misleading information that Mr. Musk introduced into the market
21 on August 7th.

22 It's also in the nature that the whole -- that this
23 transaction was at all serious and far advanced and imminent,
24 and, in particular, that investor support was secured. I mean,
25 that's what he tweeted at 3:45 p.m. on August 7th.

04:15:01
1 He quite specifically said, "Investor support is
2 confirmed. Only reason why this is not certain is that it's
3 contingent on a shareholder vote."

4 So it's not just that funding was secured or the funding
5 is past that, because clearly the transaction is not going to
6 be imminent if you don't have funding secured. But it was also
7 the whole aspect that this was well-thought-out, that this was
8 considered, and that this was --

9 **THE COURT:** So in the complaint -- let me make sure I
10 have that.

11 **MR. PORRITT:** That allegation is in -- what's the
12 paragraph? Paragraph 130 is the specific misrepresentation,
13 Your Honor. In a sort of chronological section of the
14 complaint, if you like, it is at paragraph 85.

15 3:36 p.m. Sorry, I misspoke.

16 **THE COURT:** Which?

17 **MR. PORRITT:** Paragraph 85, Your Honor.

18 And if you want an insight into Mr. Musk's state of mind
19 or scienter as of August 7th, rather than relying on
20 self-serving statements or somehow subjective pure-heart-type
21 sort of statements from his counsel, you can say what Mr. Musk
22 says about investor support, which he wrote in his later on, on
23 August 24th blog post, where he states that:

24 "After having spoken to investors," which he clearly
25 had not done by August 7th, "it's apparent that most of

Tesla's existing shareholders believe we're better off as a public company. The sentiment of those shareholders, in a nutshell, was please don't do this."

That's August 24th. Two weeks earlier, he had said investor support for the transaction is secured -- is confirmed. That's Musk's own statements. I don't know how more clearer you can get, for both scienter and a false statement you can possibly get.

And those are particularized facts. And that's not apparent -- if you want to talk about the SEC complaint -- and, I believe, the lying to the SEC complaint, for reasons we've cited, and the *Verifone* decision by the Ninth Circuit supports it, the recent decision by Judge Breyer in -- not Judge Breyer -- in *McKesson* also completely supports why it's completely okay to rely on allegations in the SEC complaint, which are, A, admitted to by the defendant in the settlement; and, B, are based upon an investigation that the SEC has conducted.

But, in any event, this one has nothing to do with the SEC. This is just contrasting Mr. Musk's statements on August 7th versus the statements on August 24th.

THE COURT: And the class period --

MR. PORRITT: -- is August 7th to August 17th, Your Honor.

THE COURT: And that's based on *The New York Times*?

04:18:11 **MR. PORRITT:** Correct, Your Honor. That's a correct
2 statement.

3 **THE COURT:** So what is new --

4 **MR. PORRITT:** Sorry, Your Honor, I got distracted.

5 So what is new, I think, in *The New York Times* article is
6 it further confirms that -- that there is no substance to this
7 transaction; that it was always just a reckless whim on behalf
8 of Mr. Musk; that he tweeted it out while driving, himself,
9 first thing in the morning, that -- at a time when he's under
10 acute stress at work, he's been taking both legal and illegal
11 drugs; and that the PIF was never really that -- was never
12 firmly behind it.

13 All of that just confirmed what are previously being
14 alluded to or concerns raised by the market, but does really
15 confirm that, yes, that's true, because those concerns were
16 raised earlier, between August 7th and August 16th, where
17 Mr. Musk, through his blog posts, essentially tries to put
18 those off, tried to correct them, and tried to say, no, no, no,
19 I am going forward, this is a real transaction, it does make
20 sense, I have thought about this.

21 I would submit that that's just absolutely untrue. And
22 that's why we allege the August 13th blog post is, in itself, a
23 misleading statement.

24 And so I think it gave comfort -- even the stock price
25 already checked down before the August 13th blog post. Why it

04:19:31 held steady or ticked up slightly was simply because he
2 confirmed -- and *Morning Star* report, we cited that in our
3 complaint -- *Morning Star* says, yes, I think this transaction
4 is going to happen; it's now not going to happen as quickly as
5 we thought it would when he first announced August 7th, but we
6 still think it's going to happen.

7 And that turned out, obviously, just to be completely
8 misguided and misled.

9 **MR. KRISTY:** Your Honor --

10 **MR. PORRITT:** If I --

11 **THE COURT:** Let him finish.

12 **MR. PORRITT:** So just on this argument that, well,
13 Mr. Musk really believed this -- that is, you know, to say
14 somehow this is a pure-heart defense to securities fraud, under
15 that basis -- that defense was run in the *SEC versus B Platform*
16 *Wilders* case to the Ninth Circuit. And they correctly rejected
17 it by noting that if such a self-serving assertion could be
18 viewed as controlling, there would not be a successful
19 prosecution or claim for fraud.

20 Every fraud doer says, Well, I meant well. Oh, I really
21 didn't mean it. You know, everyone's misled and they've lost
22 billions of dollars. That's really not what I intended.

23 There's very few defendants in a fraud action, either
24 brought criminally, regulatory, or civilly, who then says, yes,
25 you know what, I did take your money and run.

04:20:41 So unless you're going to -- under defendant's theory,
2 that would be the limit of 10(b) (5). And that's not the case
3 of the Supreme Court. The Supreme Court has rejected that
4 idea. That's not the case and not how the Ninth Circuit views
5 10(b) (5).

6 **THE COURT:** All right. I'll give you last --

7 **MR. KRISTY:** Your Honor, the crack about illegal drug
8 use is beyond the pale.

9 **THE COURT:** I don't care about that.

10 **MR. KRISTY:** Okay. But I do, because he just said it
11 in a public forum, and that's pretty outrageous.

12 But what he didn't say, what he didn't identify -- the
13 article is right there. It's an exhibit. He didn't show you
14 what -- anything new about funding secured listed in this
15 article.

16 What he now just lapsed into was some claim that this is
17 all a sham, it's a sham transaction, it was never serious.
18 Well, the article doesn't say that. And there are no facts
19 that support that. It doesn't make sense. People don't form
20 special --

21 **THE COURT:** Well, let me ask you.

22 **MR. KRISTY:** Okay.

23 **THE COURT:** I think the blog on the 13th is somewhat
24 telling. That shift -- when you look at page 25, the shift
25 from the -- his description at around line 23 to the following

04:21:52 paragraph that begins on line 25, and what I state earlier, he
2 says:

3 "The reason why I said, quote, funding secured,
4 because I had it in hand, I was left with a firm
5 impression. When I left the July 31st meeting, there was
6 no question" -- his words -- "that a deal could be closed
7 and it was just a matter of getting the process moving."

8 Different -- different tone when he describes what
9 happened after the August 7th announcement. It seems to me
10 it's a fair inference at this stage.

11 And I understand, under, you know, security law, there's a
12 heavier burden, the degree of specificity is high, scienter,
13 you've got to prove an extra degree of scienter, but this alone
14 tells me something.

15 **MR. KRISTY:** So, Your Honor --

16 **THE COURT:** You know, it's a very different tone.
17 Somebody says, oh, well, it's subject to due diligence and
18 their internal review to obtain approvals. He wanted more
19 additional details?

20 **MR. KRISTY:** Your Honor --

21 **THE COURT:** Different tone.

22 **MR. KRISTY:** But even if you were to find that --
23 remember, what we were talking about was loss causation. So
24 where's the loss causation? Where's the loss causation? It's
25 an element of the case. It's just not there.

04:23:07 Even if that's new information, a different tone, as Your
2 Honor --

3 **THE COURT:** Well, by August 7th -- or by August 9th,
4 there was already a disclosure by the SEC, or some kind of
5 disclosure. *Wall Street Journal* reported that, an SEC
6 investigation into Mr. Musk's --

7 **MR. KRISTY:** Correct. And under --

8 **THE COURT:** And there was a 5 percent decline in price
9 there. So even if he had only misled people -- you call this a
10 somewhat corrective -- quasi-corrective disclosure, and you
11 don't see anything happen, no loss causation, there was already
12 some loss suffered prior to that.

13 **MR. KRISTY:** Well, *Loos v. Immersion*, in the Ninth
14 Circuit, said price decline because there's an announcement of
15 an investigation is not loss causation. That's a matter of law
16 in the Ninth Circuit.

17 **THE COURT:** You mean there can't be any evidence of
18 loss causation at all?

19 **MR. KRISTY:** It's not -- it's insufficient evidence of
20 loss causation. The existence of an investigation -- just
21 saying that "we're being investigated" is not loss causation
22 because it doesn't revolve. That's the law of the Ninth
23 Circuit.

24 Now, they try to get around that by citing the *Lloyd* case,
25 which says, well, later on, if you combine the investigation,

04:24:13 no matter what the subject matter, with a later revelation
2 where you admit, oh, yeah, we were lying about our financial
3 statements or what have you, then you might have loss causation
4 when you connect all of those dots. But that's not an
5 allegation in this complaint.

6 In fact, this complaint sort of stops long before this,
7 sort of, SEC case comes in. So they're stuck in *Loos v.*
8 *Immersion* land. That's what the law says, that the mere
9 existence of an SEC investigation isn't enough.

10 And they don't really address that point in the brief
11 because that doesn't go to any of these specific statements,
12 Your Honor.

13 **THE COURT:** Well, the other fact is what happened when
14 *The New York Times* said that the PIF had not committed to
15 provide any cash and was far from secure?

16 **MR. KRISTY:** I understand that, Your Honor, but that's
17 not new information. They don't cite new information. That's
18 the opinion of the author based on the facts that Mr. Musk
19 disclosed on the 13th. That's why we challenge the plaintiff
20 to say, show us what's in reply Exhibit 1 that's new.

21 I understand that opinion, but that, the cases in the
22 Northern District say, isn't sufficient. The author has to
23 show new information, not repackage or recharacterize or form
24 their own conclusions about old information.

25 Their opinion may be new. Their opinion may affect the

04:25:32

market --

2 **THE COURT:** I will give you one more chance to respond
3 to that. What's new that wasn't already out there in
4 *The New York Times*?

5 **MR. PORRITT:** Well, I think the circumstances of which
6 the tweet was given confirmed the recklessness of it. It
7 therefore, concerns that perhaps there was no truth to it,
8 there was no substance behind it --

9 **THE COURT:** But what was revealed on the 17th? I
10 mean, that's the close of your class period. What's novel
11 about this, as counsel argues, in terms of against loss
12 causation? What's revealed here that terminates the -- closes
13 out the class period?

14 **MR. PORRITT:** Well, I think this is -- I would
15 describe it as the final nail in the coffin of this
16 going-private transaction, even though perhaps it's in
17 somnambulant-like status until August 24th, when they
18 finally -- Tesla finally announces it's not going forward with
19 it.

20 But I think this -- with this interview by Mr. Musk, when
21 Mr. Musk confirms that this was not a serious transaction, not
22 well-thought-out, considered, having retained advice with
23 agreement on terms, everything that you would expect from --
24 you would expect to be revealed before the CEO of a public
25 company announces going private at 420 with funding secured.

04:26:5d And you can see the reaction of Tesla's investor relations
2 and the CFO, who immediately reacts, Is this for real? And the
3 investor relations said the fact that we, as in Tesla, must go
4 full-on public with this, I assume it's as firm as it gets.

5 **THE COURT:** I understand that goes to the whole
6 causation -- to the question of who he speaks for and --

7 **MR. PORRITT:** Yes.

8 **THE COURT:** I'm talking about his argument that
9 there's no loss causation, not even enough of a semblance of
10 loss causation shown, because there's never been a corrective
11 disclosure, there's been no close to this process.

12 **MR. PORRITT:** Well --

13 **THE COURT:** And I want to get your -- what you've --

14 **MR. PORRITT:** I think the August 16th article is the
15 final corrective disclosure. There's a material stock price
16 decline after that article comes out. I think that stock price
17 is explained by the additional detail and further circumstance
18 of the lack of funding.

19 **THE COURT:** What's the additional detail?

20 So the fact that the fund had not committed to provide any
21 cash, that's not a fact that had been previously disclosed in
22 any of the prior --

23 **MR. PORRITT:** I don't believe that -- in that
24 specificity and that well sourced. It says two people, based
25 on the discussion says.

04:28:10 So from a source as reliable as *The New York Times*, I
1 think it was new information. I think the new information
2 saying that funding was not secured and then also the
3 additional circumstances of -- the circumstances of the tweet,
4 saying he tweeted from his car, et cetera, I mean, again, that
5 is about as close to deliberate recklessness as you can get
6 when a CEO is tweeting out a major public announcement
7 involving a significant corporate transaction, and he's doing
8 it, A, in a tweet, and, B, while driving.

10 And just on the loss causation point, on the SEC
11 investigation, counsel is incorrect that *Loos* governs here,
12 Your Honor. We fall squarely into *Lloyd*. No question.

13 If I can recite you to the *Lloyd* decision, also Ninth
14 Circuit, post *Loos*, 811 F.3d 1202 to 1203.

15 "In doing so, we hold that the announcement of an SEC
16 investigation related to an alleged misrepresentation" --
17 which we have here -- "coupled with subsequent revelation
18 of the inaccuracy of that misrepresentation" -- we have
19 here from the August 13th post and subsequently
20 August 24th post, as we talked about, and others -- "can
21 serve as a corrective disclosure for the purpose of loss
22 causation."

23 That is what is binding on this court, Your Honor. Not
24 *Loos*. And I know counsel likes *Loos* because it goes in his
25 direction, but he's just incorrect to say that it applies in

04:29:31

this case.

2 **THE COURT:** All right. I'm going to take this under
3 submission --

4 **MR. KRISTY:** Okay.

5 **THE COURT:** -- at this point. I think you've given me
6 enough to look at here. So thank you.

7 **MR. KRISTY:** Thank you, Your Honor.

8 **MR. PORRITT:** Thank you very much, Your Honor.

9 (At 4:29 p.m. the proceedings were adjourned.)

10 - - - - -

11 **CERTIFICATE OF REPORTER**

13 I certify that the foregoing is a correct transcript
14 from the record of proceedings in the above-entitled matter.

15 DATE: Tuesday, March 10, 2020

17 *Katherine Sullivan*

19

20 Katherine Powell Sullivan, CSR #5812, RMR, CRR
21 U.S. Court Reporter

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